IN THE

SUPREME COURT OF THE UNITED STATES

---------- TERM, [redacted] 1969

No. --[redacted] 7

LESTER GUNN, ET AL.,
Appellants

vs.

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, ET AL.,
Appellees

On Direct Appeal From the United States District Court
Western District of Texas
Waco Division

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Western District of Texas, declaring a statute of the State of Texas to be unconstitutional and threatening to enjoin its enforcement. This statement is submitted pursuant to Rule 15 of the Rules of the Supreme Court to demonstrate that this Court has jurisdiction to consider the appeal and that substantial federal questions are involved herein.

REFERENCE TO OPINIONS BELOW

The District Court rendered its opinion in the case below after completion of the evidence, arguments, and submission of briefs. It also rendered two opinions in connection with the motion for new trial by the State of Texas. These opinions are reported in —— F.Sup. —— (1968). A copy of said opinions and a copy of the orders issued in connection therewith are attached hereto and set forth in the appendix.

GROUNDS OF JURISDICTION

This action was instituted by Plaintiffs pursuant to Title 28 U.S.C. §§1331(A), 1343 (3) (4), 2201, 2202, 2281, and 2284; 42 U.S.C. 1981, 1983, and 1985. A court comprised of three judges was instituted to hear this cause in the court below as provided by 28 U.S.C. § 2284. On April 9, 1968, the court entered its injunction declaring Article 474, Vernon's Texas Penal Code, to be unconstitutional on its face and threatening to enjoin the enforcement thereof. On April 25, 1968, an order was entered denying motion for new trial and on May 31, 1968, an additional "Addendum on Motion for New Trial" was entered by the court. A notice of appeal to this court was filed in the United States District Court for the Western District of Texas on the 6th day of May, 1968.

This is a direct appeal from the judgment of a three judge district court granting, after hearing, the right to an injunction against enforcement of a State statute, a case required by Title 28, U.S.C. 2281 and 2284, to be heard by a three judge court. This court has jurisdiction to consider this appeal under Title 28, U.S.C., Section 1253. *Florida Lime and Avocado Growers, Inc.,*

et al., v. Jacobsen, 362 U.S. 73 (1960); *Radio Corporation of America v. United States* (D.C. Illinois, 1950), 95 F.Sup. 660, affirmed 341 U.S. 412, 71 S.Ct. 806, 95 L.Ed. 1062; *Stafford v. Wallace* (1922), 258 U.S. 494, 42 S.Ct. 397, 66 L.Ed. 735.

The text of Article 474 of Vernon's Texas Penal Code reads as follows:

> "Whoever shall go into or near any public place, or into or near any private house, and shall use loud and vociferous or obscene, vulgar or indecent language or swear or curse, or yell or shriek or expose his or her person to another person of the age of sixteen (16) years or over, or rudely display any pistol or deadly weapon, in a manner calculated to disturb the person or persons present at such place or house, shall be punished by a fine not exceeding Two Hundred Dollars ($200). As amended Acts 1950, 51st Leg., 1st C.S., p. 50, ch. 10, §1."

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Did the Trial Court err in failing to grant Defendant's motion to dismiss?

2. Did the Trial Court err in declaring Article 474, Vernon's Texas Penal Code unconstitutional on its face?

3. Did the Trial Court err by failing to accept and apply Texas decisions construing and limiting Article 474, Texas Penal Code, in reaching its conclusions of over breadth?

4. Did the Trial Court err in failing to grant defendant's motion for new trial for failure to perfect jurisdiction in that five days written notice of the hearing was not served on the Governor of Texas as required by 21 U.S.C., Section 2284(2)?

STATEMENT OF THE CASE

In late 1967, the President of the United States was scheduled to make inspection of Fort Hood, a United States Army installation located near Killeen, Texas. Plaintiffs in the court below, after learning that the President intended to make a dedicatory speech at Central Texas College, a newly established institution, located on a portion of land comprising the Fort Hood Reservation, sought to demonstrate against the war in Viet Nam. A crowd of 25,000, approximately, gathered to hear the President's address and was composed of civilians and servicemen in uniform. Many of the servicemen were returned Viet Nam war veterans. An air of hostility developed promptly, but the protesters decided to push on. (The court below specifically declined to rule on whether or not they should have realized that their continued approach might cause a disturbance or even violence.)

Several uniformed soldiers attacked the group of protesters and tore up their signs. The military police arrested the three named plaintiffs and subsequently turned them over, after the arrest, to the sheriff of Coryell County. The three men were transported to Copperas Cove in Coryell County where it was subsequently discovered that the disturbance had occurred in Bell County. Sheriff Lester Gunn of Bell County authorized his deputy to file "disturbing the peace"

charges against the three. It is not known what disposition, if any, the military took concerning military personnel engaged in the scuffle. The plaintiffs made bond within approximately an hour. On December 19, 1967, this case was filed and a temporary restraining order was granted prohibiting the prosecution of the charges against the three men. After investigation, on February 13, 1968, local authorities in Bell County decided that the offense had occurred on a Federal enclave on which jurisdiction of criminal matters had been ceded to the Federal Government and dismissed the three cases.

On February 14, 1968, the defendants requested dismissal on the grounds that all questions were moot. The hearing was scheduled on February 23, 1968, and the court carried the motion to dismiss with the merits of the case. Notice of the hearing was not given to the Governor of Texas as required by Title 28, U.S.C., Section 2284 (2).

After the hearing, the court ruled that Article 474 was unconstitutional on its face, as it was impermissibly and unconstitutionally broad.

QUESTIONS ARE SUBSTANTIAL

The questions presented are so substantial as to require plenary consideration because the decision of the trial court is at variance with the published opinions of this court.

A three judge Federal Court has declared that Article 474, Vernon's Texas Penal Code is unconstitutional on its face because it is impermissibly broad. In addition, the decision in question does not limit the

effect of the declaration of unconstitutionality to any one phrase or section of the statute. The opinions of the court below discuss the use of "loud and vociferous . . . language . . . calculated to disturb the person or persons present. . . ." The court did not give a reason why the remaining language of the statute was overly broad or too vague to apprise a person of the nature of the charge against him and we do not think they intended to so hold.

In holding the statute void for over breadth, the District Court has ignored the narrow interpretation placed thereon by the Court of Criminal Appeals of Texas, the highest Court on criminal matters in the State. Texas courts for a period of seventy-five years have held that the use of "loud and vociferous language calculated to disturb" related to the manner of delivery of speech rather than the contents. It was the degree of loudness that the statute, according to the highest Texas Court in criminal matters, sought to regulate. See *Anderson v. State,* 20 S.W. 358 (1892); *Thompson v. State,* 265 S.W 579 (1942); *West v. State,* 97 S.W. 2d 476 (1936).

The interpretation of the Court of Criminal Appeals of Texas limiting a conviction for the use of "loud and vociferous language" to proof of turbulent or brawling speech or language which creates so great an amount of noise that it was calculated to disturb the peace and tranquility of the occupants of a private residence or persons in a public place should have been given effect by the court below just as if written into the statute. *Cox v. State of New Hampshire,* 312 U.S. 569. *Poulos v. State of New Hampshire,* 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105, *Shuttlesworth v. City of*

Birmingham, 382 U.S. 87; 86 S.Ct. 211 (1965), *Cox v. Louisiana,* 379 U.S. 538, 85 S.Ct. 453, 459 (1965).

In view of the limitation placed on the statute by the Texas Court of Criminal Appeals, we do not believe that the reasons given in *Terminiello v. City of Chicago,* 337 U.S. 1 (1949), and the other cases cited by the court in its opinions are applicable because in each instance cited in these cases, there was an attempt to regulate the content of the speech rather than the manner in which it was given.

At the time of refusal to grant defendant's motion for dismissal, there were no charges against the plaintiffs nor were any officials of the State of Texas threatening to file charges. The initial arrests were made by the military police from Fort Hood, Texas, and plaintiffs were turned over by military police while still under arrest to county officials as they were civilians. The area where plaintiffs were arrested had been acquired by the United States Government as a part of Fort Hood Military Reservation and the local officials, at the time of dismissal of the charges, reached the conclusion that this area was still under the sole jurisdiction of the United States Government. We do not think that *Dombrowski, et al. v. Pfister,* 85 S.Ct. Rep. 1116, 380 U.S. 479 applies in a case of this kind. As there is no evidence that State officials are threatening to act in any way to "chill" the constitutional rights of plaintiffs in the future, the court below, after dismissal of the state charges, was merely giving an advisory opinion and the case should have been dismissed. *Amalgamated Association of Street Electrical Railway and Motorcoach Employees of America, Division 998 v. Wisconsin Employment Relation Board,*

71 S.Ct. 373, 340 U.S. 416, 95 L.Ed. 416; *McGrath v. Kristensen,* 71 S.Ct. 224, 340 U.S. 162, 95 L.Ed. 173; *Keller v. Potomac Electric Power Company,* 43 S.Ct. 445, 261 U.S. 428; 67 L.Ed. 731.

Several recent cases hold that where there is no evidence that local officials employed arrests and threats of prosecution under a State statute such as Article 474 in a way that would discourage the plaintiffs and their supporters from asserting and attempting to assert their constitutional rights, an injunction should not issue and the cause should be dismissed. See *Brooks v. Riley,* 374 F.Sup. 538 (1967) affirmed — U.S. — (1968), *Zwicker v. Boll,* 270 F.Sup. 131 (1967) affirmed — U.S. — (1968), *Cameron v. Johnson,* — U.S. —, 3 Cr. L. 3043.

An examination of the order issued by the Trial court leaves some doubt as to the issuance of an injunction. In the early part of the order, the court states that injunctive relief is no longer in the case. But in the summation, the court says Plaintiffs (Appellees) are *entitled* to injunctive relief. If this is interpreted as granting or denying an interlocutory injunction, Appellees urge that such is an abuse of discretion for all the reasons urged heretofore that such actions constituted error.

We submit that Article 474, Vernon's Texas Penal Statute is not overly broad and is not unconstitutional on its face. The action of the court below in enjoining the enforcement of Article 474 does, however, "chill"

the right of the State of Texas to preserve law and order within its own boundaries.

Respectfully submitted,

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By----------

CERTIFICATE OF SERVICE

I, Howard M. Fender, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Jurisdictional Statement has been served on counsel for the Appellees by depositing same in the United States Mail, postage prepaid, addressed to Mr. Sam Houston Clinton, Jr., 308 West 11th, Austin, Texas 78701, this the 3rd day of July, 1968.

HOWARD M. FENDER
Assistant Attorney General